Has the Enforcement of Foreign Arbitral Awards Gone Too Far?: *Marchetto v. DeKalb Genetics Corp.*

I. INTRODUCTION

The decision in *Marchetto v. DeKalb Genetics Corp. (Marchetto)*[1] binds individuals and corporations to an international arbitration agreement reaching far beyond their intent. In *Marchetto*, the Illinois district court held that claims of breach of, and tortious interference with a shareholder agreement, by nonparties to the shareholder agreement, are arbitrable pursuant to the arbitration clause in the shareholder agreement.[2] The *Marchetto* decision allowed the defendants, who did not sign the shareholder agreement containing the arbitration clause, to avoid litigation because they were intertwined in the dispute between the parties who did sign the shareholder agreement and were subject to the arbitration clause. The Illinois district court dismissed the action brought by the Marchettos against four defendants, one with whom they had signed a shareholder agreement containing an arbitration clause, and three with whom they had not signed an agreement.[3] The district court then ordered arbitration as to *all* of the parties.[4] The court reasoned that the arbitration clause was broad enough to include all shareholder disputes, despite the fact that the claims were brought against three parties who did not sign the shareholder agreement containing the arbitration clause.[5]

First, this Comment reviews the background of pertinent federal substantive law, including the Federal Arbitration Act and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Second, it outlines the application of this federal law to international arbitration agreements. This Comment then discusses the enforceability of international arbitration agreements pursuant to federal substantive law and reviews the court's analysis and application of the pertinent federal law in *Marchetto*. Finally, this Comment reveals how the court misconstrued and misapplied relevant law so as to enforce an

1. 711 F. Supp. 936 (N.D. Ill. 1989).
2. *Id.* at 939.
3. *Id.*
4. *Id.* at 941.
5. *Id.* at 939-40.

arbitration clause against corporations that did not sign the shareholder agreement containing the arbitration clause and therefore, should not have been bound by that arbitration clause.

II. BACKGROUND

At common law, judicial hostility toward binding arbitration prevailed, thereby hindering a strong reliance on arbitration clauses in the business world.[6] It was not until Congress' enactment of the Federal Arbitration Act (Arbitration Act) in 1925 [7] that United States federal policy began favoring arbitration clauses.[8] The Arbitration Act began a trend in the United States toward enforcement of arbitration clauses.[9] Congress passed the Arbitration Act in order to avoid "the costliness and delays of litigation, and to place arbitration agreements upon the same footing as other contracts...."[10] In section 2, the Arbitration Act declares that a written arbitration agreement is "valid, irrevocable and enforceable" in "maritime transactions" or in a "contract involving commerce." The Arbitration Act primarily governs domestic agreements, although it also applies to international agreements if they fall within the above restrictions.[11] The willingness of courts to enforce domestic arbitration agreements pursuant to the passage of the Arbitration Act built the foundation for recognition and enforcement by the courts of international arbitration agreements. International arbitration agreements were further facilitated by United States participation in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) on June 10, 1958.[12] This eventually led to the passage of

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6. Lessing, *Sauer-Getriebe KG v. White Hydraulics, Inc.: Applicability of the Federal Arbitration Act to International Commercial Arbitration*, 2 INT'L TAX & BUS. L. 331 (1984).

7. 9 U.S.C. §§ 1-208 (1988).

8. Sturges & Murphy, *Some Confusing Matters Relating to Arbitration under the United States Arbitration Act*, 17 LAW & CONTEMP. PROBS. 580 (1932); H.R. REP. NO. 96, 68th Cong., 1st Sess., pt.1, at 2 (1924).

9. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629-31 (1984); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Snyder v. Smith, 736 F.2d 409, 417 (7th Cir. 1984); *In re* Oil Spill by Amoco Cadiz, 659 F.2d 789, 795 (7th Cir. 1981); Zell v. Jacoby-Bender, Inc., 542 F.2d 34, 37 (7th Cir. 1976); Stein & Wotman, *International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules*, 38 BUS. LAW. 1685 (1983).

10. Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974), (quoting H.R. REP. NO. 96, 68th Cong., 1st Sess. 1-2); *see also* S. REP. NO. 536, 68th Cong., 1st Sess. (1924). *See generally* Healy, *An Introduction to the Federal Arbitration Act*, 13 J. MAR. L. & COM. 223 (1982).

11. Lessing, *supra* note 6, at 331.

12. 9 U.S.C. § 2; The United States, however, did not ratify the Convention until 1970. *See* Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049 (1961).

enabling legislation in 1976 that became the second chapter to the Arbitration Act, 9 U.S.C. sections 201-208.[13]

III. APPLICABILITY OF THE CONVENTION

The Convention states that "an arbitration agreement ... arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract or agreement described in section 2 of this title falls under the Convention."[14] To determine what agreements meet these definitions, four preliminary inquiries must be made:

(1) Is there an agreement in writing to arbitrate the subject of the dispute?[15]

(2) Does the agreement provide for arbitration in the territory of a signatory of the Convention?[16]

(3) Does the agreement arise out of a legal relationship, whether contractual or not, which is considered commercial?[17]

(4) Is a party to the agreement not an American citizen, or does the commercial relationship have some reasonable relation with one or more foreign states?[18]

If these inquiries are answered in the affirmative, as governed by federal substantive law,[19] the district court, according to Chapter 2 of the Arbitration Act, must find that the Convention applies and order arbitration.[20] Once the Convention is found to apply, the only permissible reason for not ordering arbitration is a finding that the agreement is "null and void, inoperative or incapable of being performed."[21] Moreover, Chapter 1, as well as Chapter 2, of the Arbitration Act state that

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13. *See generally* Aksen, *American Arbitration Arrives in the Age of Aquarius, United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 SW. U.L. REV. 1 (1971); Donke, *The United States' Implementation of the United Nations' Arbitration Convention*, 19 AM. J. COMP. L. 575 (1971); McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. MAR. L. & COM. 735 (1971).

14. Lessing, *supra* note 6, at 331.

15. UNITED NATIONS CONVENTION ON THE RECOGNITION & ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, article II(1), II(2) [hereinafter Convention].

16. Convention, articles I(1), I(3); 9 U.S.C. § 206; Declaration of the United States upon accession, reprinted in 9 U.S.C. § 154 n.29 (1982 Supp.).

17. Convention, article I(3); 9 U.S.C. § 202.

18. 9 U.S.C. § 202; 21 U.S.T. 2517 (1958), T.I.A.S. No. 6997, 330 U.N.T.S. 38. *See generally* A.J. Vandenberg, THE NEW YORK ARBITRATION CONVENTION OF 1958 (1981); G. Gaja, INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION (1978).

19. Ledee v. Ceramiche Ragno, 684 F.2d 184, 186-87 (1st Cir. 1982).

20. 9 U.S.C. §§ 201-2, 206 (1988).

21. *Ledee*, 684 F.2d 184, 187 (1st Cir. 1982).

arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract."[22] These two chapters of the Arbitration Act indicate a presumption in federal law in favor of ordering arbitration.[23]

Despite the application of the Arbitration Act, some domestic arbitration agreements are not enforced because they are contrary to public policy.[24] However, in the international arena, public policy considerations rarely affect the application of the Convention.[25] On the contrary, the courts state that any doubts regarding the validity or scope of an arbitration clause must be resolved in favor of arbitration[26] and "with special force in the area of international commerce."[27] This policy divests district courts of a significant amount of discretion in determining whether to order arbitration.[28] District courts may refuse to order

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22. 9 U.S.C. §§ 2, 206; Convention, art. II § 3; Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 (1974); Prima Paint Co. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

23. Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24-5 (1983); Snyder v. Smith, 736 F.2d 409, 417 (7th Cir. 1984); *In re* Oil Spill by Amoco Cadiz, 659 F.2d 789, 795 (7th Cir. 1981); Marchetto v. DeKalb Genetics Corp., 711 F. Supp. 936, 938 (N.D. Ill. 1989) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1984)).

24. Convention, art. V (2)(b); *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Wilko v. Swan, 346 U.S. 427 (1953) (claim arising out of Security Act of 1933 not subject to arbitration; limited to barring waiver of judicial forum where arbitration is inadequate to protect substantive rights at issue); American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968) (holding domestic antitrust transactions are not subject to Federal Arbitration Act) (Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1984)); Pitofsky, *Arbitration and Antitrust Enforcement*, 44 N.Y.U.L. REV. 1072 (1969); Aksen, *Arbitration and Antitrust--Are They Compatible?* 44 N.Y.U.L. REV. 1097 (1969); Sterk, *Enforceability of Agreements to Arbitrate; An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481 (1981); Note, *Antitrust and Arbitration in International Commerce*, 17 HARV. INT'L L.J. 111 (1976).

25. *See* Southland Corp. v. Keating, 465 U.S. 1 (1984); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

> Concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes, all require enforcement of the arbitration clause in question, even assuming that a contrary result would be forthcoming in a domestic context.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 615 (1984).

26. *Mitsubishi Motors Corp.*, 473 U.S. 614, 626 (1984); Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); City of Meridian, Miss. v. Algernon Blair, Inc., 721 F.2d 525, 527 (5th Cir. 1983); *In re* Oil Spill by Amoco Cadiz, 659 F.2d 789, 795 (7th Cir. 1981); Dickinson v. Heinold Securities, Inc., 661 F.2d 638, 643 (7th Cir. 1981).

27. *Mitsubishi Motors Corp.*, 473 U.S. 614, 629-31 (1984); Scherk v. Alberto-Culver Co., 417 U.S. 506, 516-17 (1974); *In re* Oil Spill by Amoco Cadiz, 659 F.2d 789, 795 (7th Cir. 1981); Marchetto v. DeKalb Genetics Co., 711 F. Supp. 936, 938 (N.D. Ill. 1989); Karlberg European Tanspa, Inc. v. JK-Josef Kratz Vertriebsgesllschaft, 618 F. Supp. 344, 347 (N.D. Ill. 1985).

28. *See Mitsubishi Motors Corp.*, 473 U.S. 614 (1984); *Scherk*, 417 U.S. 506 (1974); *In re* Oil Spill by Amoco Cadiz, 659 F.2d 789 (7th Cir. 1981); Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969, 973-74 (2d Cir. 1974).

arbitration only after finding that an agreement is "null and void, inoperable or incapable of performance,"[29] and such a finding must be based on factors that can be applied neutrally on an international scale,[30] such as fraud, mistake, duress, and waiver.[31] Thus, there are limited circumstances under which an arbitration clause is invalid or is not within the parameters of the Convention.

IV. ENFORCEABILITY OF ARBITRATION CLAUSES PURSUANT TO THE CONVENTION

Once a court has established that the agreement falls under the Convention, the court has several means to ensure that the agreement is enforced.[32] First, the court can stay any action filed within its district that is based on an issue encompassed within the arbitration clause.[33] Second, the court can compel arbitration if the site for arbitration is within its district.[34] Third, the court may order parties to arbitrate -- even outside the United States.[35]

Parties often attempt to avoid the enforcement of an arbitration clause by arguing that the dispute is not within the scope of the clause, thereby prohibiting the application of the Convention. The courts, however, are reluctant to accept such arguments.[36] Where the scope of the clause is at issue, the court is forced to decide if the clause is broad enough to include the presented dispute.[37] The court initially refers to the language of the clause,[38] and it does so in light of the federal policy

29. Convention, art. II (3); 9 U.S.C. § 201.

30. Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1144-45 (5th Cir. 1985); Ledee v. Ceramiche Ragno, 684 F.2d 184, 186-87 (1st Cir. 1982).

31. Convention, art. II (3).

32. *See* I.T.A.D. Associates, Inc. v. Podar Bros., 636 F.2d 75 (4th Cir. 1981).

33. 9 U.S.C. § 3; *Ledee*, 684 F.2d 184, 187 (1st Cir. 1982).

34. *See* Sedco v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140 (5th Cir. 1985) (quoting Commerce Park at DFW Freeport v. Mardian Constr. Co., 729 F.2d 334, 388 (5th Cir. 1984) (quoting Wick v. Atlantic Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979))).

35. 9 U.S.C. § 206; *Sedco*, 767 F.2d 1140, 1146 (5th Cir. 1985).

36. *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983); Butler Products Co. v. UnitStrut Corp., 367 F.2d 733, 736 (7th Cir. 1966); Marchetto v. DeKalb Genetics Corp., 711 F. Supp. 936, 939-40 (N.D. Ill. 1989).

37. *See generally* Commerce Park at DFW Freeport v. Mardian Constr. Co., 729 F.2d 334, 338 (5th Cir. 1984); Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39 (3rd Cir. 1978).

38. Sedco v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1145 (5th Cir. 1985) (citing Commerce Park at DFW Freeport v. Mardian Constr. Co., 729 F.2d 334, 338 (5th Cir. 1984)).

encouraging the enforceability of arbitration clauses.[39] This federal policy leads the courts to construe arbitration clauses broadly.[40] The court will only deny the enforcement of a clause if "it can be said with positive assurance that an arbitration clause [within an agreement] is not susceptible of an interpretation which would cover the dispute at issue...."[41] Thus, when any question of fact exists as to the scope of a clause, the disputed issue will be held subject to the clause and arbitration will be ordered.[42] In fact, one court held that the scope of the arbitration clause itself is an issue that can be decided in arbitration.[43]

Another argument often proposed as a defense to enforcement is that nonparties are intertwined in a dispute between signatory parties to the arbitration clause and therefore, arbitration cannot proceed. Generally, one party to the agreement alleges that ordering the signatory parties to arbitrate while one of the signatory parties continues a court action with a nonsignatory party prohibits efficient judicial management.[44] The courts, however, emphasize that even if piecemeal litigation is the result of compelling arbitration it is not a basis for refusing arbitration.[45] The courts refer to Article II, sections one[46] and three[47] of the Convention

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39. *See* 9 U.S.C. §§ 201-2, 206; Mitsubishi Motors Corp. Soler v. Chrysler-Plymouth, Inc., 473 U.S. 614 (1984); Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); City of Meridian, Miss. v. Algernon Blair Inc., 721 F.2d 525, 527 (5th Cir. 1983); *In re* Oil Spill by Amoco Cadiz, 659 F.2d 789, 795 (7th Cir. 1981); Dickinson v. Heinold Securities, Inc., 661 F.2d 638, 643 (7th Cir. 1981).

> [Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.... The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of the arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

40. Wick v. Atlantic Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979).

41. Commerce Park at DFW Freeport v. Mardian Constr. Co., 729 F.2d 334, 338 (5th Cir. 1984).

42. 9 U.S.C. § 3.

43. *See* Moses H. Cone Memorial Hosp., 460 U.S. 1, 24-25 (1983); Marchetto v. DeKalb Genetics Co., 711 F. Supp. 936, 939-40; Lessing, *supra* note 6, at 331.

44. 9 U.S.C. § 206.

45. *See* Dean Whitter Reynolds v. Byrd, 470 U.S. 213, 221-22 (1985); Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1, 19 (1983); Sedco v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1147 (5th Cir. 1985); C. Itoh & Co. v. Jordan Int'l Co., 552 F.2d 1228, 1232 (7th Cir. 1977).

46. Convention, art. II(1) states that:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

which state that signatory countries shall recognize arbitration clauses and shall refer parties to arbitration when the previously discussed four criteria are met. Furthermore, the Arbitration Act, in accordance with Article II, section three, states that a court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement...."[48] The clear language of the Convention and the Arbitration Act indicates that no judicial discretion is available once a clause is determined to be valid.[49] In such an instance, compelling arbitration is mandatory.

For example, the court in *C. Itoh & Co., Inc. v. Jordan International Co.* stated that "considerations of judicial economy bear no relation to 'the making and performance of an agreement to arbitrate.'"[50] And further, the Supreme Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* held that "[u]nder the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement."[51] Essentially, even if the dispute must be settled in two separate forums, one judicial and one arbitral, arbitration still must be compelled in order to comply with the Arbitration Act and the Convention.[52] Thus, an arbitration agreement must be enforced as to its parties, even if the arbitration proceeding is not able to resolve the entire dispute between all of the parties.

V. APPLICATION AND ENFORCEMENT OF THE ARBITRATION ACT: *Marchetto v. DeKalb Genetics Corp.*

A. The Facts:

The parties in *Marchetto v. DeKalb Genetics Corp.* were all shareholders in DeKalb Italiana S.P.A. (DeKalb Italiana).[53] In 1963,

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47. *Id.* at art. II(3):

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

48. 9 U.S.C. § 3.

49. *Id.*

50. 552 F.2d 1228, 1231 (7th Cir.) (citation omitted). *Cf.* Tai Ping Ins. Co. v. M/V Warschau, 731 F.2d 1141 (5th Cir. 1984) (holding that intertwined disputes must be resolved in one forum).

51. 460 U.S. 1, 19 (1983).

52. C. Itoh & Co. v. Jordan Int'l Co., 552 F.2d 1228, 1231-32 (7th Cir. 1977).

53. 711 F. Supp. 936, 937 (N.D. Ill. 1989).

DeKalb Italiana was formed as a joint venture between DeKalb Agriculture Association, Inc. (DeKalb Agriculture) and two Italian citizens, the Marchettos.[54] At the time of the joint venture, each of the two groups, DeKalb Agriculture and the Marchettos, owned fifty percent of the outstanding common stock of DeKalb Italiana. The two groups entered into a shareholders' agreement[55] which prohibited any shareholder from transferring his shares without the permission of the other shareholders.[56] In addition, the agreement gave the other shareholders the option to purchase the shares.[57] The agreement was later amended to include a clause subjecting "any shareholder dispute" to arbitration by a panel of arbitrators in Rome, Italy.[58]

One of the original parties, DeKalb Agriculture, subsequently renamed DeKalb Corporation (DeKalb), sold its shares in DeKalb Italiana on July 15, 1982, to DeKalb-Pfizer Genetics, a partnership between DeKalb and Pfizer Genetics, Inc.[59] DeKalb Agriculture, however, sold its shares in DeKalb Italiana without the consent of the Marchettos and without offering them the option to buy the DeKalb Italiana shares.[60] Following this sale, DeKalb reorganized into three companies: DeKalb Energy, which is DeKalb's successor corporation, DeKalb Genetics, and Pride Petroleum Services, Inc. DeKalb Genetics replaced DeKalb in the DeKalb-Pfizer Genetics partnership.[61] DeKalb Energy, as DeKalb's successor in interest, was the only defendant in this action which was a party to the shareholder agreement.

These transactions led to the Marchettos' suit against DeKalb Genetics Corp., DeKalb Energy, DeKalb-Pfizer Genetics, and Pfizer Genetics, Inc. The Marchettos claimed: (1) breach of the shareholder's agreement, and (2) tortious interference with the shareholders' agreement.[62]

B. The Court's Findings:

The district court began its review of the actions by first outlining the strong federal policy favoring the enforcement of arbitration

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54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 938.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*

agreements.[63] The district court determined the applicability of the Convention by making the four necessary inquiries, as previously discussed.[64] The district court's findings were that:

(1) there was a written agreement;
(2) the agreement provided for arbitration in a signatory country, namely Italy;
(3) the shareholders' agreement incorporated a legal relationship; and
(4) the actions in dispute had a reasonable relationship to a foreign state, Italy.[65]

Based on these findings, the district court held that (1) the possibility that Italian law may divest the arbitrators of jurisdiction to resolve the dispute was not determinative of an American court's duty to enforce an otherwise valid arbitration clause pursuant to the Convention, and (2) the presumption favoring arbitrability prohibited the court from severing the tortious interference claim as beyond the scope of the arbitration clause, thus, finding the claim nonarbitrable.[66] These holdings are correct as to the Marchettos and DeKalb Energy, DeKalb's successor in interest, therefore making arbitration mandatory pursuant to Article II of the Convention, sections two and three, and the Arbitration Act, sections three and four. The author posits, however, that these holdings were incorrect as to the three defendants who did not sign the shareholders' agreement containing the arbitration clause.

C. Marchetto's Mistaken Defense to Enforcement of the Arbitration Agreement

After answering the four operative questions discussed above, the court stated, "There is no dispute that these factors are present in this case. Italy is a signatory country. The shareholder agreement unquestionably embodies a legal relationship. The arbitration clause was incorporated into this agreement [and] ... the allegedly unlawful transfers of DeKalb Italiana stock have a reasonable relationship to Italy."[67] Conceding that this accurately described the parties' relationship and, therefore, that the Convention clearly applied, the only means for the Marchettos to avoid enforcement of their arbitration clause and dismissal of their judicial action was to claim one of the defenses listed in Article

63. *Id.*
64. *Id.* at 939. *See supra* notes 15-18 and accompanying text.
65. *Id.*
66. *Id.* at 939.
67. *Id.* (citation omitted).

II, section 3 of the Convention.[68] Thus, the Marchettos alleged that the arbitration agreement was "incapable of performance" because three of the four defendants were not parties to the agreement and, thus, Italian law would divest the arbitrators of jurisdiction to decide the dispute.[69] Moreover, under the "incapable of performance" defense, the Marchettos alleged that the claim for tortious interference was not subject to arbitration because it went beyond the scope of the arbitration clause.[70] As such, any award ordered for this claim would be unenforceable pursuant to Article V, section 1(c) of the Convention.[71]

The "incapable of performance" defense,[72] however, has rarely proven successful and was not successful for the Marchettos. The Marchettos, by inappropriately conceding that the Convention applied, were forced to establish a difficult statutory defense. The Marchettos should have, in the first instance, argued that the Convention did not apply to DeKalb Genetics Corp., DeKalb-Pfizer Genetics, and Pfizer Genetics, because they did not sign the shareholder agreement containing the arbitration clause.[73] Thus, "three of the four defendants [were] not parties to the agreement [or to the arbitration clause therein]"[74] and therefore, the Convention did not apply according to Article II, section (1) which states that: "[e]ach Contracting State shall recognize an agreement in writing under which the *parties* undertake to submit their disputes to arbitration..."[75] (emphasis supplied).

D. Analysis and Critique

As to the three nonparty defendants, the *Marchetto* district court incorrectly answered the first key question: "Is there an agreement in writing to arbitrate the subject of the dispute?"[76] Although there is an agreement in writing between the Marchettos and DeKalb Energy, the remaining three corporations were not parties to that writing. Thus, as

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68. Convention, art. II(3) states that: "The court ... shall ... refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

69. Marchetto v. DeKalb Genetics Corp., 711 F. Supp. 936, 939 (N.D. Ill. 1989).

70. *Id.*

71. Convention, art.V (1)(c) states that: "(1) Recognition and enforcement of the award may be refused ... [if] ... (c) The award deals with ... or it contains decisions on matters beyond the scope of the submission to arbitration...."

72. Convention, art. II (3); 9 U.S.C. §§ 3-4.

73. This is not the same as proving the defense of beyond the scope of the arbitration clause, which indicates that an arbitration clause exists as to those parties; the question is merely what issues are encompassed in that clause.

74. Marchetto v. DeKalb Genetics Co., 711 F. Supp. 936, 939 (N.D. Ill. 1989).

75. Convention, art. II(1).

76. 9 U.S.C § 202.

between the Marchettos and those corporations, there was no agreement in writing to arbitrate the dispute. Therefore, the other three key questions and the defenses listed in the Convention become irrelevant because the Convention cannot possibly apply.

The court appeared to misunderstand the pertinent federal substantive law that must be applied in this area and thus, came to an illogical and untenable conclusion. The court applied the written agreement made between the Marchettos and DeKalb Energy to the remaining three nonsignatory defendants. The "[o]bject of the Arbitration Act is the enforcement of the arbitration agreement made by the parties themselves in the manner they themselves provide."[77] Likewise, the Convention only applies to parties to an arbitration agreement,[78] because the Convention speaks of enforcement only after it has been determined that there is an agreement signed by the parties.[79] Furthermore, the enforcement ability of the courts pursuant to the Convention, Art. II(2) and (3) and 9 U.S.C. section 3, extends only to those who have signed an arbitration clause. Thus, because the arbitration clause had not been signed by these parties (DeKalb Genetics Corp., DeKalb-Pfizer Genetics, and Pfizer Genetics Inc.), neither the Convention nor its enforcement ability applied to them.[80]

As to DeKalb Energy's motion to dismiss the action and request to order arbitration, the court's ruling was correct, or at least tenable. However, the Arbitration Act and the Convention do not apply to any dispute between persons or entities who have not signed an arbitration agreement.[81] Thus, the arbitration agreement should not have been applied to DeKalb Genetics Corp., DeKalb-Pfizer Genetics, and Pfizer Genetics Inc.

The *Marchetto* district court misconstrued the operative language in the relevant case law that it cited. The court applied the arbitration clause to the nonparties because "federal law permits non-parties to an arbitration agreement to participate in the arbitration proceedings."[82] The case law indicates that an arbitration clause must be enforced between parties despite the presence of nonparties. However, the case law does not

77. A/S Ganger Rolf v. Zeeland Transp., Ltd., 191 F. Supp. 359, 360 (S.D.N.Y. 1961).

78. Convention, art. II (2) and (3).

79. *Id.*

80. *Id.*

81. *See supra* notes 46-48.

82. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 (1973); Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazoni v. Achille Lauro, 712 F.2d 50, 53-54 (3rd Cir. 1983); Zell v. Jacoby-Bender, Inc., 542 F.2d 34, 37 (7th Cir. 1976); Marchetto v. DeKalb Genetics Corp., 711 F. Supp. 936 (N.D. Ill. 1989).

indicate that nonparties may or shall participate in the arbitration proceedings. Instead, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, on which the district court relied *sub judice*, the Supreme Court outlined a very different proposition. The Court stated that an arbitration clause is enforceable as to the parties even if the action with the nonparty must be held in a separate forum.[83] The Supreme Court did not say the nonparty may or shall participate in the arbitration proceedings. Rather, the Court stated that the arbitration proceedings must move forward despite the nonparty's inability to participate. This implies that resolution of the dispute may require different forums: judicial, for parties who have not signed an agreement, and arbitral, for parties who have signed an agreement.

The *Marchetto* court also relied on *C. Itoh & Co., Inc. v. Jordan International Co.*,[84] which enforced an arbitration clause despite the entanglement of a nonparty in the dispute. The court held that the dispute between the two parties to the arbitration clause, Itoh and Jordan, was subject to arbitration. However, the court held that the dispute between Itoh and Riverview, a nonparty to the arbitration clause, was subject to the judicial forum.[85] This case does not suggest that the nonparty to the arbitration clause is subject to that clause. Rather, it simply implies that the nonparty does not undermine the enforcement of the agreement as to its parties. *C. Itoh* suggests that the three nonparty defendants in *Marchetto* should not hinder arbitration proceedings between Marchetto and DeKalb Energy. The holding in *C. Itoh* does not subject the three nonparty defendants to the arbitration agreement between Marchetto and DeKalb Energy. Instead, any dispute arising between the three nonparty defendants and Marchetto should be subject to the judicial forum.

Lastly, in *A/S Ganger Rolf v. Zeeland Transp., Ltd.*, the court stated that a "complete stranger to an arbitration clause cannot be bound by any award made against it."[86] The court's logic in *A/S Ganger Rolf*, suggests that if an arbitral award cannot be enforced on a nonparty, surely the arbitration clause itself cannot be enforced on the nonparty. The *Marchetto* district court, however, held exactly the contrary, giving rise to totally illogical results. According to the holding in *A/S Ganger Rolf*, a nonparty to an arbitration agreement cannot be bound by an arbitration award made against it;[87] but, according to *Marchetto*, the nonparty can be bound by the entire arbitration agreement itself. Such contradictory results cannot be sustained.

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83. *Moses H. Cone Memorial Hosp.*, 460 U.S. 1, 19 (1983).
84. 552 F.2d 1228 (7th Cir. 1977).
85. *Id.* at 1231-32.
86. 191 F. Supp. 359, 363 (S.D.N.Y. 1961).
87. *Id.*

E. Reasons for Arbitration

By looking to the underlying reasons for signing arbitration agreements, it can be suggested that *Marchetto* is not in line with these considerations. An enticing reason for entering into arbitration agreements is that it allows parties to specify important factors affecting arbitral proceedings.[88] Thus, arbitration agreements are often preferred to judicial proceedings, because arbitral proceedings can be fashioned to suit the parties' own needs. For instance, arbitration permits parties to appoint the arbitrators who will hear any potential disputes.[89] Also, the parties to an arbitration agreement decide what substantive rules will apply, such as the rules of the American Arbitration Association, trade rules of that particular commercial area, United Nations Commission on International Trade (UNCITRAL) rules, or others.[90] Finally, the parties' right of forum selection is arguably the most important.[91] This decision is paramount because "arbitration *proceedings* are subject to the national arbitration laws of the country in which they are held."[92] In other words, the amount of permissible judicial interference is determined by each forum's rules on arbitration proceedings.[93]

These are certainly only a few of the underlying reasons why parties choose to sign arbitration agreements, but they are nonetheless representative of some of the factors taken into account by each party. With these factors in mind, it is apparent that the arbitration agreement between the Marchettos and DeKalb should not apply to the remaining three defendants. There is no reason to assume that, as between the Marchettos and DeKalb Genetics Corp., DeKalb-Pfizer Genetics, and Pfizer Genetics, the same circumstances existed that would have caused the Marchettos and these defendants to sign exactly the same arbitration agreement as the one between the Marchettos and DeKalb. As to these nonsignatory defendants, there may exist reasons why Italy would not be the forum choice or why other rules of arbitration would be chosen. Trying to outline the nature of an arbitration agreement between the Marchettos and these defendants is pure, *ad hoc* speculation. For this reason, the court should not have bound these parties to an arbitration agreement that they did not have the opportunity to fashion to their needs.

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88. Higgins, Brown & Rouch, *Pitfalls in International Commercial Arbitration*, 35 BUS. LAW. 1035, 1036-37 (1980).

89. Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 849 (1961).

90. Note, *International Commercial Arbitration: A Comparative Analysis of the U.S. System and the UNCITRAL Model Law*, 12 BROOKLYN J. INT'L L. 703 (1986).

91. *Id.* at 704.

92. *Id.* (emphasis added).

93. Park, *Arbitration of International Contract Disputes*, 39 BUS. LAW. 1783, 1788-89 (1984).

Unfortunately, the district court's decision binds the Marchettos to arbitrate with the nonsignatory defendants according to an arbitration agreement made without these three corporate defendants in mind, and in fact before these corporate defendants existed. Certainly, that result is beyond the intended scope of the Arbitration Act, the Convention, and the parties' intentions.

VI. CONCLUSION

In its zealous desire to enforce the arbitration clause between Marchetto and DeKalb (subsequently DeKalb Energy), the court failed to recognize the restriction of the Arbitration Act and the Convention. The Arbitration Act and the Convention are restricted to disputes arising between parties to an arbitration agreement. Once the court has determined that the dispute is in fact between entities who have not signed an arbitration agreement, the scope of any arbitration clause cannot be found broad enough to include them. Indeed, there is a presumption in favor of arbitration,[94] but that does not suggest that the court should go beyond its jurisdictional power to incorporate people or entities who did not sign the original agreement. The provisions of the Arbitration Act and the Convention are designed to insure that parties proceed in their transactions the way they themselves originally fashioned,[95] and to unify the standards by which arbitration agreements are recognized and enforced.[96] Certainly, in molding the agreement that the Marchettos and DeKalb Agriculture (subsequently DeKalb and then, DeKalb Energy) eventually signed, the Marchettos did not intend the agreement to direct its dispute resolution with any party, other than the one with whom it signed the agreement. Both the district court's and the Marchettos' failure to accurately consider the application of the Convention to these circumstances resulted in this untenable decision.

Predictability was the desired outcome from the United States' accession to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Illinois district court, however, by broadening the Convention beyond its intended boundaries, has injected uncertainty back into the international arbitration arena.

Denise Simmons

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94. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985); *Moses H. Cone Memorial Hosp.*, 460 U.S. 24-25 (1983); Marchetto v. DeKalb Genetics Corp., 711 F. Supp 936 (N.D. Ill. 1989).

95. A/S Ganger Rolf v. Zeeland Transp., Ltd., 191 F. Supp. 359, 390 (S.D.N.Y. 1961).

96. CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, S. EXEC. DOC. E, 90th Cong., 2d Sess. (1968).